Supreme Court, U.S.
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IN THE SUPREME COURT OF THE
UNITED STATES
OCTOBER TERM 1971

UNITED STATES OF AMERICA
ex rel.
JOSEPH SMITH, E. HARRY XIFO,
VICTOR E. CORDONE, HAROLD
HARRIS and SIGGO V. HEJSELBAK,

71-343

Petitioners

vs

RALPH ORISCELLO, Sheriff of
Union County,

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE UNITED STATES

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TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES
OF THE SUPREME COURT OF THE UNITED STATES

Joseph Smith, E. Harry Xifo, Victor E. Cordone, Harold Harris and Siggo V. Hejselbak, the petitioners herein, pray that a writ of certiorari issue to review the judgment of the United States District Court for the District of New Jersey entered in the above-entitled case on June 9, 1971.

OPINIONS BELOW

A. The opinion of the United States District Court of New Jersey, unreported, is printed in Appendix A, attached hereto and made a part hereof.

B. The opinion of the New Jersey Supreme Court, unreported, dated November 14, 1967, is printed in Appendix A, attached hereto and made a part hereof.

C. The opinion of the Appellate Division of the Superior Court of New Jersey, dated July 21, 1967, bearing Docket No. A901-65, is printed in Appendix A, attached hereto and made a part hereof.

D. The entry of judgment of the Superior Court of New Jersey, Union County, dated May 6, 1966, is attached hereto and made a part hereof.

JURISDICTION

A. The jurisdiction of the United States Supreme Court is invoked under Amendment V of the United States Constitution which provides that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury,...."

B. The jurisdiction of the United States Supreme Court is invoked under Amendment VI of the United States Constitution which provides that "the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been

previously ascertained by law, and to be informed of the nature and cause of the accusation;..."

C. The jurisdiction of the United States Supreme Court is invoked under Amendment XIV of the United States Constitution which provides that "...Nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The petitioners appealed to the Appellate Division of the Superior Court of New Jersey (Docket No. A901-65). The Appellate Division of the Superior Court affirmed the judgment of the Trial Court by a per curiam opinion dated July 21, 1967.

The petitioners joined in an appeal as of right under the New Jersey Constitution, Article VI, Section 5, Paragraph 1(a) to the Supreme Court of New Jersey (Docket No. 5794). The Supreme Court summarily granted the State's motion to dismiss the appeal treating the appeal of right under the New Jersey Constitution as a Petition for Certification, and as such, denied certification on November 14, 1967.

Petition for reargument of the motion to dismiss the appeal was denied on December 19, 1967 by the New Jersey Supreme Court.

On January 4, 1968, petitioners filed a petition for Writ of Habeas Corpus in the United States District Court of New Jersey.

On June 9, 1971, the Honorable Frederick B. Lacey denied the issuance of the Writ of Habeas Corpus, adopting and incorporating the Report and Recommendation of Magistrate Devine as the opinion of the Court and supplemented the same by a Memorandum and Order.

A Notice of Appeal dated July 2, 1971, from a denial of the Writ of Habeas Corpus, was duly served and filed. Application was thereafter made to the United States Court of Appeals for the Third Circuit for a continuance of bail and a Certificate of Probable Cause for Appeal.

On August 5, 1971, these applications were denied and an Order was entered accordingly.

QUESTION PRESENTED

May the law of conspiracy be broadened to hold that a conspiracy with a person is the same as a conspiracy against that person?

LAW INVOLVED

The Fifth, Sixth and Fourteenth Amendments of the United States Constitution provide:

Fifth: Of Crime and Indictments

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger, nor shall any person be subject, for the same offense, to be twice put in jeopardy of life and limb; nor shall be compelled in any criminal case to be witness against himself; nor to be deprived of life, liberty or property, without due process of law, nor shall private property be taken for public use without just compensation.

Sixth: Of Criminal Prosecutions

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Fourteenth: Citizens and Their Rights - Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the

United States, and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. Nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

The crime charged and determined to be the law of the case was not proven, and the Court permitted the State to seek out another charge, for which there was not indictment or presentment by a grand jury, on which to convict the petitioners.

The circumstances surrounding the constitutional violation are as follows:

The grand jury in Union County presented to the Court an indictment alleging that the petitioners, being public officers of the Township of Clark

> "...did unlawfully combine, unite, confederate and conspire among themselves and together with one Robert Edward Lee (who is named as co-conspirator, but not as a co-defendant herein) to unlawfully demand, receive and take from the aforesaid Robert Edward Lee the sum of $5,000.00 for the favorable consideration of the granting of a variance..."

In a preliminary motion to quash the indictment, Judge Weidenburner held (D23a-10 to D29a-13; T3, T3a):

> "I am constrained to find that it does sufficiently describe the offense... the charge found by the grand jury in this case is a charge of a conspiracy on the part of the named defendants with one who is named as co-conspirator but not as a co-defendant to unlawfully demand, receive and take from the aforesaid Robert Edward Lee, the individual who is, as previously stated, named as a co-conspirator but not as a co-defendant, the sum of $5,000.00 for the favorable consideration of the granting of a variance...the said sum being a fee or reward not allowed by law..."

Counsel for the defendants at the outset of the trial exhorted the Prosecutor to "...tell me, what is the agreement"

charged (D75a-4; T45). The paucity of facts alleged in the opening, and the utter failure to relate them to the indictment, led to a motion by the defense for direction of judgment of acquittal even on the State's opening (D62a-6 to 8; T32). The Court in the denial of this motion characterized the opening statement as

> "...a highly inadequate statement of the elements of the indictment but, nevertheless, contains the germs of a statement..." (D106a-19 to 21; T77).

The theory of the State's case was stated by the Prosecutor during the exchange between the Trial Judge and the Prosecutor (D416a-24 to D417a-15; T920, T921):

> "The Court:...I am asking you now to tell me, after you have put your case in, whether you have proved a case in which Robert Edward Lee is a co-conspirator.
>
> Mr. Callahan: I believe the State has.
>
> The Court: Well, explain that to me.
>
> Mr. Callahan: Sir, I believe that the fact that Mr. Lee paid the $5,000.00 which was the fee exacted from him in return for the approval by these particular gentlemen, that the fact that he did in fact pay over this money and see that particular sum of money be satisfied by the vote on September 28, 1964, in return has allowed Mr. Lee to become such a co-conspirator."

Premised on the charge in the indictment,the learned Trial Judge disagreed with the Prosecutor as to this thesis (D417a-15 to 24; T921).

It is to be noted, however, that during the course of the trial, the Trial Judge permitted the introduction into evidence statements by witnesses adduced on behalf of the State upon condition that the proof of the conspiracy charged in the indictment would be made out (Db15-10 to Db29-12). During the direct examination of the witness, Robert Edward Lee (D359a-15 to D360a-2; T733-34) the Trial Judge stated to the Prosecutor:

> "The Court:...Let me just say this to you; If eventually it is decided, and I haven't been able to make up my mind because I don't know enough about the facts and I am

> not sure I know enough about the law, that the evidence of acts of any of the defendants is not chargeable to any of the other defendants. Nevertheless you are trying to prove your case against each one of the five defendants, and if there is any question about it, I will confine it, at least until I find some connection with the others, to that defendant."

Notwithstanding the numerous conditional proffers of testimony by the State and the need of connection all premised upon Lee being a co-conspirator, there was not proof adduced of a conspiracy, as established by the law of the case, supra, in which Robert Edward Lee was a co-conspirator to extort money from himself. On this issue the ruling on the part of the learned Trial Judge, and finally so conceded by the Prosecutor, is found in the following colloquy (D418a-1; T922):

> "The Court:...But I can't see how you have proved that he was a co-conspirator to extort from himself. I don't see how you can do that.
>
> Mr. Callahan: Sir, to extort from himself, no."

The Trial Court expressly found that the State did not prove a case in which Lee was a co-conspirator to extort from himself, (D418a-1, T922). This was the only charge in the indictment. Nevertheless, the trial court permitted the case to go to the jury.

The Trial Court, notwithstanding its ruling that Lee was not proven to be a co-conspirator to extort from himself, allowed the case to proceed with a new conspiracy charge, without Robert Edward Lee as a co-conspirator therein.

The new conspiracy charge, totally separate, different and distinct, against the defendants (though not indicted therefor), and which was at odds with the conspiracy spelled out by Judge Weidenburner and ruled to be the law of the case by the Trial Judge, was permitted for the jury's consideration, to wit: a conspiracy among the five defendants against Lee, i.e., a conspiracy in which Lee was not a co-conspirator but rather a

victim of the conspiracy.

The Trial Judge, however, permitted retention of Lee's (and his wife's) testimony as though Lee had been a co-conspirator. Thus, hearsay evidence which would have been permissible in evidence against all the defendants, if Lee were a co-conspirator, was permitted to be used against all of the defendants in support of the newly charged conspiracy in which Lee was not a co-conspirator. This hearsay was testimony by Mr. and Mrs. Lee which comprised their conversations, jointly and severally with the defendants, Cordone, Smith, Xifo, Hejselbak, and with the State's witness Zande. This hearsay testimony represented the bulk of the State's case against the defendants (Db59-12 to 30).

The underlying reason, originally, for naming Robert Edward Lee as a co-conspirator can be ascertained from the following comment by the Prosecutor (D416a-16 to 22; T920):

> "Mr. Callahan: Sir, in order to obtain, as I understand the cases, the benefit of Mr. Lee's testimony and the nailing of Mr. Lee as a conpirator -- I do not desire at this time to delegate to myself the reasons why Mr. Lee was designated in this particular indictment as a co-conspirator."

Further factual data revealing the Trial Judge's action in permitting the trial to proceed with a new conspiracy charge is the following (D417a-15 to 24; T921):

> "The Court: I don't see it, Mr. Callahan. I rather expect you to say that you think that was perhaps an early view of the case before it got to this point and that you now feel that you don't need to prove that Robert Edward Lee was a co-conspirator since you've got five other people in here. But I can't see how you have proved that he was a co-conspirator to extort from himself. I don't see how you can do that."

The Trial Judge thereupon struck from the indictment that portion wherein Lee was charged as a co-conspirator. The exact ruling was (D418a-18 to 21; T922):

> "The Court: I would think that section of the indictment should be disposed of, should be stricken out as far as that's concerned."

After reply by the State, the Court again ruled (D419a-10 to

11; T923):

> "The Court:...and I think that we can disregard or strike out Lee as a co-conspirator..."

Upon the Court finding that Lee was not a co-conspirator to extort money from himself, a motion for acquittal by the defense was made and denied by the Trial Judge (D421a-3 to 20; T925). Defense counsel, upon the denial of the motion for acquittal, argued (D421a-21 to D422a-17; T925, T926):

> "Mr. Stepacoff: I would like to know, then, if your Honor pleases, what is the conspiracy charged against us? At this late date I don't know. If we strike out Lee, what is the new combination, by whom, and for what? I don't know what the agreement of the conspiracy is, and I have had to struggle from the time I got into this case to determine what it is we are being charged with. Now, if your Honor excludes me -- and I do not understand your Honor--"
>
> The Court: I think that Lee was not shown to be a co-conspirator. He could not be.
>
> Mr. Stepacoff: If that is the fact, if your Honor please, then there has to be a new conspiracy charge against us, because the evidence was being admitted or rejected on the basis that certain statements made by Lee as co-conspirator could have properly been used against the other five."

Notwithstanding the denial of defense counsel's motion for an acquittal, the Court retained Lee in the case as a co-conspirator, but nevertheless held that there was not proof that Lee participated as a co-conspirator, ruling (D451a-16 to 25; T957):

> "The Court: I was wrong in what I said. You are quite right, I was wrong in the reasons for saying that Lee could not be a co-conspirator.
>
> Mr. Stepacoff: In other words, he could be?
>
> The Court: He could be.
>
> Mr. Stepacoff: But there was not proof that he was.
>
> The Court: I doubt if there was."

And again at D454a-4 to 5; T960:

> "The Court: ...I don't think that his participation in this was as a co-conspirator..."

Having thus ruled that Lee was not a co-conspirator, the Court decided nevertheless to retain Lee in the case as a co-conspirator and ruled (D468a-2 to 5; T973):

> "The Court: The easiest way for me to solve this problem would be to say, 'Well, he is still in there.' I haven't actually taken any action. We will leave him in there."

The Court further ruled as follows (D468a-15 to D469a-3; T973, T974):

> "The Court: Well, I don't think that there has been a conspiracy by Lee proved, even though I gave the wrong reasons for that result.
>
> Mr. Stepacoff: I agree with your Honor.
>
> The Court: The conspiracy established by proof, insofar as anything that has been established --
>
> I mean the evidence offered is capable of inferring conspiracy among the five defendants, but I don't think that it's capable of inferring, of giving rise to an inference of conspiracy with Lee.
>
> But I don't know that that makes very much difference, to tell the truth."

The Court thereupon reversed its previous finding that Lee was to be stricken from the charge in question as a co-conspirator, and once again held Lee in as a co-conspirator. The following explanation was offered by the Trial Judge (D541a-15 to D542-3; T1120, T1121):

> "The Court: ...So that the indictment stands as it was. I have taken no action, even though I expressed my opinion, when the jury was not present, to counsel as to the failure of the charge that Lee was the co-conspirator. And, therefore, it stands as it is. But --
>
> Mr. Stepacoff: You say now the indictment stands as it is?
>
> The Court: Stands as it is. There has been no change in it, no motion has been made. I have heard no motion by either side, and I have taken no action. Whether I should or not, I have not."

The Trial Judge's misconception of the conspiracy, held to be the law of the case, finds further factual support as revealed by his charge to the jury. The charge is found at

D581a to D647a; T-1297 to T-1363. In the charge the learned Trial Judge submitted at least two conspiracies for its consideration: one conspiracy, with Lee as a co-conspirator, and the other, a conspiracy in which Lee was not a co-conspirator, but rather the victim of a conspiracy.

Instances in the charge of the Trial Judge wherein the jury was permitted to consider a conspiracy in which Lee was not a co-conspirator are:

(a) "It is for you to determine whether ...these acts were done pursuant to an understanding among the defendants." (D615a-10 to 15; T1331)

(b) "...but he (Lee) was obviously not indicted because he was said to be the victim of this scheme." (D621a-3 to 5; T1337 (Parenthesis ours.)

(c) "However he (Lee) may be said to have participated in it (the conspiracy)... But even if he did not, the conspiracy may have existed among less than all of the persons named." (D621a-5 to 10; T1337) (Parenthesis ours.)

(d) "In other words the Indictment says that five defendants and Lee conspired, but it also says that the five defendants conspired among themselves." (D621a-10 to 13; T1337)

Instances where the charge was ambiguous and ambivalent rendering the instruction equally susceptible of application to the conspiracy in which Lee was not a co-conspirator as well as to the conspiracy wherein Lee was a conspirator are:

(a) "The State further contends that it was pursuant to the same agreement among the defendants that Mr. Cordone accepted the sum of $5,000.00 in cash from Mr. & Mrs. Lee..." (D619a-16 to 20; T1335)

(b) "...that Smith was a spokesman with the backing of the four other defendants, demanded that Lee pay $5,000.00 for their votes in favor of a variance and that Lee paid it." (D619a-2 to 7; T1335)

(c) If you find...these four councilmen and Mr. Smith were all present and any one of the defendants in-

dicated that money was to be taken in connection with their vote..." (D615a-18 to 22; T1331)

The learned Trial Judge also spelled out the different verdicts which could be found by the jury in its consideration of the two different conspiracies, and charged as follows (D625a-8 to 17; T1341):

> "...
>
> "You may find all of the defendants guilty or all of the defendants not guilty, or you may find any two or more guilty. As I have said, you cannot convict less than two, unless you find that he conspired with Lee, because it takes two to make a conspiracy. Now if you find that one alone conspired with Lee, alone, then you could convict one of the defendants, but not otherwise.
>
> "..."

Notwithstanding the obvious failure of due process resulting from the Trial Judge's ambivalent and ambiguous rulings; and, over defense counsel's argument and exception, the Court thus permitted the jury to deliberate upon a conspiracy not charged in the indictment, to wit, a conspiracy of the five defendants against Lee. If the jury found proof of a conspiracy of the five defendants against Lee it was instructed that it might return a guilty verdict against no less than <u>two</u> of the defendants for having conspired among themselves against Lee. The jury was also permitted to consider a conspiracy of the five defendants together with Lee (as had been held to be the law of the case). If the jury found proof of a conspiracy of the five defendants and Lee to extort from Lee it was instructed that it might return a guilty verdict against only <u>one</u> defendant if he conspired with Lee. By his charge the learned Trial Judge thus allowed the jury the choice of more than one conspiracy, while the indictment spelled out only one conspiracy, to wit, a conspiracy of the five defendants together with Lee to extort from Lee. The verdict returned after some 8-1/2 hours of deliberation (jury retired at 11:25 a.m. (D645a; T1361) and verdict rendered at 7:46 p.m. (T1425) was "...guilty of the conspiracy charge." (D648a-17 to 19; T1427).

In the United States District Court, United States Magistrate Devine's analysis of the Trial Court's rulings were characterized in his Memorandum as follows:

> "Furthermore, the trial court vacillated on the issue of Lee being a co-conspirator and neither made such an ultimate ruling nor instructed the jury that he was not a participant in the conspiracy alleged," pg. 4, l. 11 Report and Recommendation Exhibit "A".

With all due deference to Magistrate Devine's Report and Recommendation, his findings were also ambivalent on the crucial issue of the case, to wit, what was the specific offense charged in the indictment for which the defendants were tried. On page 4, l. 9 the Magistrate holds:

> "But, as noted, the petitioners were not indicted for conspiracy to extort."

Judge Lacey adopting the Report and Recommendation of Magistrate Devine expressly alludes in a footnote to the preceding quotation, and holds, "...the petitioners were not indicted for conspiracy to extort," (See pg. 2 of Judge Lacey's Memordanum and Order, Exhibit "A").

Magistrate Devine on page 6, l. 3 of his Report and Recommendation thereafter, contrariwise, finds that the petitioners were indicted, tried and convicted "...of conspiring to violate N.J.S. 2A:105-1"(extortion).

Because of this crucial inconsistent finding by Magistrate Devine, which was adopted as the opinion of the Court by Judge Lacey, Page 3 of Memorandum and Order, counsel on the application for the continuance of bail for the defendants on July 9, 1971, was constrained to ask Judge Lacey, (Exhibit "E" pg. 7 l.13-23)

> "...what is the charge that your Honor has found them to have been charged with ...I cannot say to your Honor that I can truthfully say to the Court, 'This is what Judge Lacey has found the defendants guilty of'.
>
> "That is, I don't know what the particular charge is that you have found the jury passed upon."

Judge Lacey replied (Exhibit "E", Pg. 8, l. 8-11):

> "The Court: And I wondered then, and I wondered now, why you can't understand what he was charged with. Your people were charged with violating 2A:105-1. What's what they were charged with violating."

The crime set forth in N.J.S. 2A:105-1 is that of extortion only, and not of conspiracy.

REASONS FOR GRANTING THIS WRIT

Each of the petitioners have been deprived of basic justice and a fair trial by the court from the time the Indictment was returned throughout the trial. The several State appellate adjudications have been unresponsive to the basic constitutional issue raised at the trial and on appeal. An illogical and ill-reasoned decision formed the basis for the denial by the United States District Court of the issuance of a writ of Habeas Corpus. The United States Circuit Court of Appeals for the Third Circuit failed to recognize the obvious federal constitutional issue involved in the cause which had defied resolution in the United States District Court for three years and six months; it denied the petitioners a Certificate of Probable Cause for Appeal.

At the trial level, the trial court permitted the prosecution to depart from proof of the specific conspiracy charged in the single count Indictment which conspiracy had been specifically defined by pre-trial proceedings addressed to the Indictment. The trial court permitted the prosecution to proceed with proof of a conspiracy not charged in the Indictment; and submitted to the jury for its consideration, two separate and distinct conspiracies, although but a single conspiracy had been charged in the Indictment.

The New Jersey Superior Court, Appellate Division avoided the issue of the constitutional violation resulting from a trial on two separate and distinct conspiracies in a single count indictment, and resorted to incidental non-constitutional considerations as the bases to affirm the verdict. The Superior Court of New Jersey never answered the substantial federal constitutional

question presented by the petitioners. Upon appeal to the New Jersey State Supreme Court as a matter of right under the New Jersey State Constitution, that Court, unprecedentedly treated the defendants' right of appeal as a discretionary matter, and summarily refused to hear the cause.

The United States District Court, on application for a Writ of Habeas Corpus, reassigned the Petition to various United States District Court Judges for a period of three years and six months and, after the last reassignment, denied the issuance of the Writ of Habeas Corpus by an opinion based upon a United State Magistrate's memorandum, which patently did neither recognize nor answer the federal constitutional issue presented by the petitioners from the onset of the trial.

The United States Circuit Court of Appeals for the Third Circuit, on application for a Certificate of Probable Cause for Appeal, within ten days of filing of the application therefor, denied the application, again thus leaving unanswered the basic constitutional question, may the law of conspiracy be so broadened to hold that a conspiracy with a person is the same as a conspiracy against that person?

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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